Cibao Meat Products *and* Local 169, Union of Needletrades, Industrial and Textile Employees, AFL–CIO. Case 2–CA–32811

April 11, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On August 17, 2001, Administrative Law Judge Howard Edelman issued the attached decision. Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's findings[1] and conclusions except as set forth below and adopts the recommended Order as modified and set forth in full below.[2]

The judge found that Respondent violated Section 8(a)(1) by suspending employee Mario Mendez for 1 day. As more fully set forth in the judge's decision, Respondent suspended Mendez on January 17, 2000, for insubordination because he spoke up at an employee meeting called by Respondent that day. At the meeting, Supervisor Elizabeth Sandner informed the assembled employees that they were required to help open the plant gate in the morning before they started work. Mendez responded that it was not his job to open the gate, it was security's job, and that "we are the workers, the employees, after you open the factory." Sandner did not interrupt Mendez or ask him to stop speaking. The meeting took place after the gate was opened for the day by an employee and there was no evidence introduced that either Mendez or any other employee failed or refused to open the gate after having been directed to do so by Sandner. Respondent excepts, however, claiming, among other things, that Mendez' actions were unprotected insubordination rather than protected, concerted activity, as the judge found them to be. We disagree.

It is well-settled Board law that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity."[3] Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action . . . ."[4] *"Particularly in a group-meeting context, a concerted objective may be inferred from the circumstances."*[5] Thus, an employee, like Mendez, who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an employee meeting, is engaged in the "initiation of group action as contemplated by the *Mushroom Transportation* line of cases . . . ."[6]

The Board has specifically rejected the contention advanced by Respondent that an employee who protests a management decision at an employee meeting called to announce that decision is guilty of unprotected insubordination if the employer did not first solicit the employee's views.[7] Contrary to Respondent's contention, the protected, concerted nature of such protests does not depend on whether the employer has solicited the grievance of the employees at the meeting.[8]

[1] Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We further find that the judge's factual findings are amply supported by the record evidence, and we reject as unfounded Respondent's arguments to the contrary.

Some of Respondent's exceptions are that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. We are satisfied on a review of the record that Respondent's contentions are without merit. For example, Respondent contends that the judge exhibited bias by granting the General Counsel's motion to reopen the record. In his answering brief, counsel for the General Counsel asserts that he made a verbal and written motion to reopen the record for the purpose of entering disciplinary records into evidence, but that the General Counsel "is unaware that either its oral or written motion to reopen the record has been granted by the ALJ." The record does not contain any post-hearing motion to reopen the record, or any indication that such a motion was granted. Consequently, there is no basis for finding that the judge was biased by granting the General Counsel's motion.

[2] We modify the judge's recommended Order and notice consistent with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and *Ferguson Electric Co.*, 335 NLRB 142 (2001), to conform more closely to the Board's usual remedial provisions.

The remedy section of the judge's decision inadvertently states that Respondent has violated Sec. 8(a)(1) and (3). The judge found elsewhere in his decision that Respondent did not violate Sec. 8(a)(3) and there are no exceptions to that finding.

[3] *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

[4] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

[5] *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (emphasis added).

[6] Id. Accord: *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[7] *Whittaker Corp.*, supra.

[8] *NLRB v. Talsol Corp.*, 155 F.3d 785, 796–797 (6th Cir. 1998), enfg. 317 NLRB 290 (1995) (employee who challenged management speaker about safety issues at employer-called employee meeting was engaged in protected, concerted activities; no evidence statements or questions were solicited); *CKS Tool & Engineering, Inc.*, 332 NLRB 1578, 1586 (2000) (employee who challenged management statements, at employer-called meeting of employees, was engaged in protected,

To be sure, we are sensitive to the fact that an employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect.[9] We recognize that even an employee who is engaged in concerted activity may, by conduct that is sufficiently egregious or offensive, lose the protection of the Act.[10] There is no indication in the record, however, that Mendez' statement was an intemperate outburst in response to Respondent's directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act.[11] Under these circumstances, we sustain his right to make it.

The judge found that Respondent constructively discharged Mario Mendez, who did not return to work after his unlawful suspension on January 17, 2000. The judge found that when Respondent unlawfully discharged employees Jose Luis Mendez, Cayetano Flores, and Modesto Flores the following day—a finding we adopt[12]—it placed an intolerable burden on Mario Mendez and that therefore he was constructively discharged. We do not adopt the judge's constructive discharge finding. Without regard to whether the judge's finding was supported by substantial evidence and otherwise in accord with the law, the complaint never alleged a constructive discharge and Respondent was never placed on notice at the hearing that the General Counsel was so contending. On the contrary, during the hearing, when the General Counsel characterized Mendez' loss of employment as a "termination," Respondent objected and raised the issue as to whether the General Counsel was arguing a constructive discharge. In response, the judge ruled that "the complaint alleges a suspension and that's what it is." The General Counsel replied, "Yes, Your Honor. And we acknowledge that his employment terminated as of that day. He did not go back to work after that day." Consequently, since the contention was never alleged in the complaint and was not fully or fairly litigated, we reverse the judge's finding in this regard.[13]

ORDER

The National Labor Relations Board orders that Respondent, Cibao Meat Products, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or laying off its employees because of their protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose Luis Mendez, Cayetano Flores, and Modesto Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mario Mendez, Jose Luis Mendez, Cayetano Flores, and Modesto Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the

concerted activity; no evidence that comments or questions were solicited).

[9] *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (grievance committeeman did not lose the protection of the Act where he made an impulsive, derogatory remark to an employer representative in a grievance meeting which was heated on both sides).

[10] See *United Parcel Service*, 311 NLRB 974 (1993).

[11] Cf. *J. P. Stevens & Co.*, 219 NLRB 850 (1975), enfd. 547 F.2d 792 (4th Cir. 1976) (employee's statement, at captive audience speech, that a coworker's question should be answered and not ignored held protected, concerted activity; 22 employees who engaged in planned conduct designed to disrupt similar meeting and ignored repeated directions to sit down and stop their disruptions, were not engaged in protected activity).

[12] Member Acosta would hold that the judge improperly relied on *Wright Line* in finding that the Respondent unlawfully discharged employees Jose Mendez, Cayetano Flores, and Modesto Flores. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Member Acosta notes that the judge specifically found that the primary reason for the discharge of Jose Mendez, Cayetano Flores, and Modesto Flores was the belief of the Respondent's owner, Heinz Vieluf, that they might protest the unlawful suspension of Mario Mendez in a manner that would affect their work. The Respondent believed that the family relationship among the three employees was a sufficient basis to assume that they would act concertedly and the Respondent therefore discharged them. Vieluf admitted that Jose Mendez "was an agitator within the company" and must be terminated; that because Cayetano Flores was the brother-in-law of Jose Mendez, he quite possibly could have the same ideas, and, must also be terminated; and that because Modesto Flores was the brother of Cayetano Flores, he could have the same ideas as well, and must be discharged. Accordingly, because the conduct for which the Respondent claims to have discharged the three employees was protected concerted activity, the *Wright Line* analysis is inappropriate. Such analysis is properly used in resolving cases alleging violations where the respondent's motivation for taking the allegedly unlawful action is disputed. Here, however, it is undisputed that the Respondent discharged Jose Mendez, Cayetano Flores, and Modesto Flores because the Respondent believed they would act concertedly in the protected endeavor of protesting Mario Mendez' unlawful suspension. See *Felix Industries*, 331 NLRB 144, 146 (2000).

[13] *Tri-City Fabricating & Welding Co.*, 316 NLRB 1096 fn. 1 (1995); *Q-1 Motor Express, Inc.*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995).

suspension and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 17, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or suspend you because of your protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jose Luis Mendez, Cayetano Flores, and Modesto Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mario Mendez, Jose Luis Mendez, Cayetano Flores, and Modesto Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the suspension and discharges will not be used against them in any way.

CIBAO MEAT PRODUCTS

Rita C. Lisko, Esq. and *Christian R. White, Esq.*, for the General Counsel.

Irene Donna Thomas, Esq. (Thomas & Associates), for the Respondent.

Stuart Lichten, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 21 and 22, 2001, in New York, New York.

On February 28, 2001, the above complaint issued based upon a charge filed by Local 169, Union of Needletrades, Industrial and Textile Employees, AFL–CIO (Union), against Cibao Meat Products, Inc. (Respondent), alleging violations of Section 8(a)(1) and (3) of the Act.

Based upon the entire record herein, my observation of the demeanor of witnesses, and briefs submitted by counsel for the General Counsel and counsel for Respondent, I make the following finding of facts and conclusions of law.

Respondent is a corporation with an office and place of business in the Bronx, New York, where it is engaged in the processing and nonretail sale of meat products. During the course of such business Respondent annually sells and ships from its Bronx facility products valued in excess of $50,000 directly to points outside the State of New York. Respondent also purchases and receives at its Bronx facility goods and products valued in excess of $50,000 directly from points outside the State of New York.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

It is admitted, and I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent employs approximately 30 production employees, and several security employees at its Bronx facility. Respondents owners and officers are Heinz Vieluf and Lutzi Vieluf-Isidor. Its quality control manager is Elizabeth Sandner. It is admitted, and I find that the above individuals are supervisors within the meaning of the Act.

On the morning of January 17, production employees Mario Mendez, Jose Luis Mendez, Modesto Flores, and Cayetano Flores arrived to work together at approximately 5:50 a.m. When they arrived, the gate to Respondents entrance was still locked. As usual, they remained in their car and waited for a member of management or a security employee to open the gate. Shortly thereafter, Lutzi Vieluf-Isidor, arrived and unlocked the gate. After unlocking the gate, Lutzi stood and briefly waited for someone to assist her in lifting the gate. Usually, a security guard would assist the member of management in opening the gate. However, on this particular morning, the security guard did not arrive to assist L. Vieluf-Isidor, so another employee voluntarily lifted the gate.

After the gate was opened, the employees entered the plant and changed clothes in order to begin the workday. As the employees entered the work area, Elizabeth Sandner, abruptly announced that all of the employees gather for a meeting. Approximately 25 to 30 employees assembled in the production area for the meeting. Sandner stated that Lutzi was very upset that no employee immediately assisted her in opening the gate that morning. She then stated a new policy would be implemented immediately. Employees would be responsible for opening the gate. Previously employees were not required to open the gate. If an employee did not voluntarily comply, he would be suspended for 1 day.

At this meeting, after being informed of this new mandatory policy, employee Mario Mendez spoke up and stated that it was not his job to open the gate; rather, it was security's responsibility to open the gate. Mendez then stated to Sandner that "we are the workers, the employees, after you open the factory." Mendez testified that after he made this statement, he noticed some of the other employees nodding agreement with him. Directly after this meeting and announcing the new policy, Sandner spoke with Lutzi and informed her that Mendez did not want to open the gate and abide by the new policy. At that moment, Lutzi announced over Respondent's intercom system, that Mario Mendez was suspended for 1 day. Upon hearing that he was suspended for 1 day, Mendez returned to the locker room and went home as ordered.

While Mendez was changing his clothes to go home, the employees who had been assembled for the meeting with Sandner, including Jose Luis Mendez, Cayetano Flores, and Modesto Flores, spoke among themselves and decided to speak to Lutzi on behalf of Mario Mendez. When the group of about 30 employees approached Lutzi, she was extremely upset, she asked them if they did not want to work. She insisted that if the employees did not want to work, then she would close the factory down. Cayetano Flores then stated that he definitely wanted to work, but he also wanted Mario Mendez to keep his job. Then Raphael Daleano, a security guard, reiterated to Lutzi that, traditionally, opening the gate was the responsibility of security. Lutzi then told the employees that Mario Mendez could return to work tomorrow, but he was still suspended because "her word had to count for something." After the employees meeting with Lutzi she had a private meeting with Mario Mendez. In her direct testimony, Lutzi admits explaining to him that the reason he was suspended was because he protested the new policy in front of the other employees. She further stated, on cross- examination, that if Marion had spoke with her privately about his concerns with her new policy, she would not have suspended him.

Later that afternoon, the bulk of the employees gathered together in the employee break area to discuss the Mario Mendez suspension and how to better represent themselves with management. Cayetano Flores, accompanied by Jose Luis Mendez and Modesto Flores, initiated the meeting and suggested that when addressing Respondent they should be well prepared and should take detailed notes of Respondent's responses and proposals.

Heinz Vieluf testified that he first learned of the incident with Mario Mendez from Sandner on the afternoon of January 17. That evening he spoke to Lutzi, his sister by phone, who told him about the gate incident and Mario's suspension. He told Lutzi to terminate Cayetano Flores, Modesto Flores, and Jose Luis Mendez. He did not give her his reasons for his decision.

On January 18, after the employees reported to work, Jose Luis Mendez, Modesto Flores, and Cayetano Flores were summoned into Lutzi's office and were told that they were terminated. When they asked the reason for their termination Lutzi told them she didn't know. Lutzi told them she knew they were "serious and responsible people" Cayetano Flores asked for a dismissal letter and Lutzi told them to return later that day and pick up their dismissal letters.

Later that day the above employees picked up their dismissal letters and a letter addressed to Mario Mendez. The letters to Cayetano Flores, Jose Luis Mendez, and Modesto Flores stated they were temporarily laid off because of lack of work. Mario Mendez' letter stated he was suspended for 1 day.

The above four employees were longtime employees with a combined working time of over 20 years. These employees credibly testified without contradiction that there had never been any layoffs as long as they were employed.

Heinz Vieluf testified that he discharged Jose Luis Mendez because he suspected he may have been responsible for improperly mixing a batch of meat in July 1999. He admitted he had no evidence to support this allegation. He admits that other employees engaged in similar conduct but were not discharged. He also admitted that he discharged Mendez because he might have retaliated against Respondent because of his brothers suspension. Heinz testified he discharged Modesto and Cayetano Flores because they were the brothers-in-law of Jose Luis Mendez and Mario Mendez because he feared "they might take some action" because of the discharge of Jose Luis Mendez.

Heinz also testified he discharged Modesto Flores because of an incident that allegedly occurred on Friday, January 14. He testified that before he left on a business trip that morning, he observed a commotion in the packing area of the plant. When he investigated the disturbance, an employee, Andres Martinez, a/k/a Ramon Guayabo, was wielding a knife at a group of employees, and that he assumed the incident involved Modesto Flores and decided that evening that he would terminate Flores when he returned on the following Monday. However, he did not inform anyone of his decision until Monday evening after learning about the gate incident from both Ms. Sandner and Lutzi. Though Modesto Flores was terminated for allegedly having some sort of altercation with Martinez, Heinz admitted that Marinez was not subject to any disciplinary action, notwithstanding the fact that Martinez had wielded a knife at employees on at least three occasions and management was aware of those incidents.

Employees Andres Pullinario testified that sometime after the above discharges Heinz held a meeting of employees. At this meeting Pullinario testified he was "nervous" about the working environment at Respondent since the termination of the three men. He asked Heinz why the men had been terminated. Heinz responded that Jose Luis Mendez "was an agitator within the company;" therefore, he was dismissed. He then went on to explain that because Cayetano Flores and Modesto Flores were related to Jose Luis Mendez, then they may all have the same ideas; therefore, he discharged these men as well.

Shortly after the discharges described above these employees contacted representatives from the Union. Jose Luis Mendez held two organizational meetings at his home at the end of January and the beginning of February. By the end of the second meeting, the Union collected the requisite amount of authorization cards and filed a petition for election with the National Labor Relations Board on February 17. Subsequently, an election for representation was conducted and the Union was certified as the collective-bargaining representative on July 14, 2000.

Analysis and Conclusion

In determining whether an employer discriminates against an employee because of his membership in or activity on behalf of a labor organization, General Counsel has the burden of proving that the employees' membership in, or activities on behalf of such labor organization was a motivating factor in the discrimination alleged. Once such factor is established, the burden then shifts to the employer to establish that such action would have taken place in the absence of the employees' membership in, or activities on behalf of such labor organization. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1982); *Wright Line*, 251 NLRB 1080 (1980), enfd. 662 F.2d 899 (1st Cir.), cert. denied 455 U.S. 989 (1982).

In the instant case, it is admitted by Lutzi that the sole reason for her suspension of Mario Mandez was his speaking out at the meeting to protest Respondent's new policy of requiring the production employees to open the plant gate in the morning. The issue presented is whether such conduct constitutes protected concerted activities.

In *Whittaker Corp.*, 289 NLRB 933 (1988), the Board in reversing the administrative law judge stated:

> Specifically in *Meyers I*, 268 NLRB at 494, and again in *Meyers II*, 281 NLRB 882, we reaffirmed *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), and other cases holding that "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." Thus, the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action . . . ." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

The Board went on to state:

> "Particularly in a group-meeting context, a concerted objective may be inferred from the circumstances."

The evidence in this case establishes that Mario Mendez was protesting Respondent's new policy on behalf of all employees. Thus Mendez told Sandner at the meeting when Respondent's new policy was first announced "we are the workers, the employees, after you open the factory." See *Whittaker*, supra at 934.

Moreover, in *Avery Leasing, Inc.*, 315 NLRB 576 (1994), the Board held that "where an employee, in the presence of other employees, complains to management concerning wages, hours, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employees purport to speak on behalf of himself.

In any event, within hours following the Mendez suspension, the employees met with Lutzi wherein Cayetano Flores then calmly stated that he definitely wanted to work, but he also wanted Mario Mendez to keep his job, and Raphael Daleano, a security guard, reiterated to Lutzi that, traditionally, opening the gate was the responsibility of security.

Thus, I conclude Mario Mendez was engaged in protected concerted activity, and that he was admittedly suspended for such activity. It is clear that General Counsel has established its *Wright Line* burden.

Respondent simply contends that such activity was not protected, and that if it were, Respondent had no knowledge of the concerted nature of such protected activity. For the reasons discussed above, I reject Respondent's contentions and conclude that Mario Mendez was suspended in violation of Section 8(a)(1).

In most situations, an employee who voluntarily quits cannot contend that the separation was a discriminatory discharge in violation of Section 8(a)(3). In many cases, however, the Board and the courts have deemed that employees whose terminations appeared voluntary had been "constructively discharged." In the *Crystal Princeton* case, the Board defined "constructive discharge" as follows:

> There are two elements which must be proven to establish a constructive discharge. First, the burden imposed upon the employee must, cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

In the instant case all discriminatees are longtime employees, and interrelated. Mario Mendez and Jose Luis Mendez are brothers. Modesto Flores and Cayetano Flores are also brothers. Additionally, the Mendez brothers and the Flores brothers are brothers-in-law to the Mendez brothers. The four alleged discriminatees are a family unit. Indeed, the primary reason for the discharge of Jose Luis Mendez and the Flores brothers was Heinz Vieluf's belief that they might protest Mario Mendez' suspension in a manner that would affect their work.

The credible testimony of Pullinario, described below, who was still employed by Respondent at the time he testified establishes that Jose Luis Mendez, Modesto Flores, and Cayetano Flores were discharged because of their close and familial relationship.[1] I conclude to require Mario Mendez to return to work after Respondent has unlawfully discharged his brother, and two brothers-in-law satisfies the requirements for a finding of a constructive discharge. Accordingly, I conclude that Mario Mendez was constructively discharged in violation of Section 8(a)(1) of the Act.

Pullinario also testified that he was "nervous" because he did not understand why the three men were terminated. Therefore, he decided to ask Heinz Vieluf directly why the discharges occurred. Heinz responded by stating that Jose Luis Mendez "was an agitator within the company"; therefore, he must be terminated. He further stated that because Cayetano Flores is the brother-in-law of Jose Luis Mendez, then he quite possibly could have the same ideas he had to be terminated, and finally, that because Modesto Flores is the brother of Cayetano Flores, he may have the same ideas as well. It is clear that Heinz believed that a family relationship was a sufficient basis to assume they would act concertedly, and they were discharged for such reasons.

Heinz Vieluf did not deny such conversations. Moreover, in view of his contradictions and other statements discussed below, I conclude Heinz is not a credible witness and credit only his admissions against Respondent's interest. Moreover, the timing of the discharges, 1 day after Mario Mendez' suspension, confirm that the discharges were solely motivated by the employees familial relationship with Mario Mendez.

In *Thorogen Toll & Molding, Inc.*, 312 NLRB 628 (1993), an employee was discharged because of his wife and mother-in-law's union activity. The Board found a violation of Section 8(a)(1) and (3) of the Act, because the employer associated the employee with the wife and mother-in-law and discharged the employee based on this relationship. Here, it is clear that J. Vieluf associated the men with one another.

It is clear that General Counsel has established it *Wright Line* burden with an exceptionally strong prima facie case.

As set forth above, each of the three alleged discriminatees was given a letter stating that they were being laid off.

Such letter was issued pursuant to the direction of Heinz Vieluf. However, during Heinz' testimony he testified that in fact the employees were discharged, rather than being laid off.

When attempting to explain why each man was given such a letter that could potentially be sent to the State of New York for unemployment benefits, he stated he was not concerned about what the letter stated, because "depending on the circumstances that arise," he had a practice of changing his mind as to why an individual is terminated.

Thus based upon the contradictions as to layoff v. discharge and his explanation, it is clear that he is not a credible witness, and his testimony can be credited only when it is an admission against Respondent's interest.

Heinz Vieluf initially testified that he discharged Jose Luis Mendez in January, because he thought he may have improperly mixed a batch of meat in July 1999. On cross-examination, Heinz testified that he had absolutely no proof to support his suspicion. Moreover, Mendez was never disciplined in any way for this alleged mistake. He then contradicted this testimony by testifying that based on Mario Mendez' 1-day suspension and the relationship between the Mendez brothers, he thought Jose Luis Mendez might "do something to the product."

In view of Heinz Vieluf's contradictions concerning the reasons for discharge and his admissions that he fabricated reasons for discharge depending on the circumstances, I do not credit his testimony that Mendez was discharged because of his belief that Mendez spoiled a batch of meat in July 1999.

Additionally I find such contention incredible in view of the 6-month delay between the alleged meat incident and the discharge, the total absence of any reason why he would suspect Mendez of spoiling the meat, and his admission that other employees spoiled similar batches of meat they were not discharged. There I find Respondent has not met its *Wright Line* burden with respect to Jose Luis Mendez.

With respect to the discharge of Cayetano Flores, Heinz Vieluf testified that he terminated Flores because he thought Flores might do "the same thing that I was thinking Jose might do because they used to work together." On cross-examination, Vieluf modified his original testimony as to why he discharged Cayetano Flores. He testified that he was also worried that Cayetano Flores "might react differently" because his brother, Modesto Flores, was terminated. He further testified that he was also concerned because "Mr. Jose Luis Mendez and Mr. Cayetano had a family relationship." No testimony was introduced as to why he formulated such belief. In view of my unfavorable impression of Heinz Vieluf's credibility I find his reasons for discharging Cayetano unbelievable. Accordingly, I find Respondent has not met is *Wright Line* burden.

With respect to Modesto Flores, Heinz Vieluf testified that he terminated Flores because of an incident he had with Andres Martinez, a/k/a Ramon Guayabo, an employee at Cibao. He testified that an altercation occurred in late summer or early fall 1999 when Martinez pulled a knife on Modesto Flores. Flores

[1] In determining the credibility of a witness, the Board considers the fact that testifying may pose a risk to the witness. In *Shop-Rite Supermarket, Inc.*, 231 NLRB 72 (1977), the Board noted that if testimony is given at considerable risk of economic reprisal, including loss of employment, then the testimony is not likely to be false.

credibly testified that no one from management, including Heinz Vieluf, spoke to him privately about any incident involving Mr. Martinez. Flores does recall that approximately 3 months before the incident with Martinez, Lutzi and Sandner assembled the employees for a meeting where Martinez was discussed. Lutzi, at this meeting told the employees not to joke with Mr. Martinez because he was "slow."[2] Modesto told Lutzi that the employees did joke with Martinez occasionally, but Martinez would "come after us even when we weren't joking with him." Lutzi did not respond.

Heinz Vieluf thereafter testified contradicting his initial testimony that he discharged Modesto Flores because of an incident between Martinez and Modesto that allegedly occurred on January 14, 2001. He testified that on the morning of January 14, before left for a business trip, he noticed a commotion in the packing area. When he investigated, he observed Martinez wielding a knife at multiple employees. He then testified that he assumed the incident involved Flores, though at the time, he had no proof substantiating this claim. He then testified that he verified his assumption, but failed to state with whom he verified his assumption, when he verified his assumption, or how he verified his assumption. Further, Vieluf provided no corroborating testimony or documents to support his assertion that there was an altercation involving Martinez, and Flores.

Based upon my impressions of Heinz Vieluf's credibility, discussed above, his contradictory reasons for the discharge of Modesto Flores, his total lack of evidence to support any altercation between Martinez and Flores, I conclude Vieluf's reason's for Flores' discharge are untrue.

However, assuming the alleged incident occurred between Flores and Marinez on January 14, 2001, the discipline imposed does not comport with Respondent's normal practice. Vieluf admits to having knowledge that Martinez pulled a knife on various employees on at least three occasions, but did not reprimand him for any of these incidents. He also admits that when an incident between two employees occurs, both receive the identical reprimand or discipline. Martinez was never disciplined for such alleged incident.

[2] Four witnesses, including Vieluf and Vieluf-Isidor, testified that Martinez is a mentally slow, problematic individual, who "retaliates" by wielding a knife if he perceives harassment from other employees.

Accordingly, I conclude Respondent has failed to meet its *Wright Line* burden.

The facts establish that after the discharge of Jose Luis Mendez, Modesto Flores, and Cayetano Flores, Jose Luis Mendez contacted the Union. Union organization began the last week in January. A petition for an election was filed. An election was held on March 30 which the Union won. The Union was thereafter certified to represent Respondent production and maintenance employees.

General Counsel contends Respondent's refusal to reinstate the discharged employees was a violation of Section 8(a)(3) of the Act.

There is no evidence that Respondent took any action to discourage the employees right to organize. The discharges occurred prior to any union activity. Since the remedy for an 8(a)(1) discharge is the same effective remedy as to the employees, I reject General Counsel's contentions.

REMEDY

Having found Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act, I shall recommend it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off or discharged the employees whose names are set forth below, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs or, a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Mario Mendez	Cayetano Flores
Jose Luis Mendez	Modesto Flores

[Recommended Order omitted from publication.]